In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 466

JULIAN RALPH ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–2) is reported at 333 F. 2d 950.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1964. A petition for rehearing was denied on August 7, 1964. The petition for a writ of certiorari was filed on September 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction for conspiracy to violate the liquor laws in the sale and distribution of non-taxpaid whiskey to one Kennington should be

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reversed because of the acquittal of the principal supplier, who had operated through a co-defendant before petitioner undertook to supply Kennington.

STATEMENT

Petitioner and four co-defendants (Dryden, Hutcheson, Godwin and Rogers) were indicted in the United States District Court for the Middle District of Alabama for conspiracy to violate the internal revenue laws relating to the sale and distribution of non-taxpaid liquor from June 1961 to September 1962 (R. 16–20). During the trial Hutcheson pleaded guilty (R. 551–553). The jury acquitted Dryden, but convicted the other defendants (R. 534–535). Petitioner was sentenced to imprisonment for three years (R. 541). On appeal by petitioner alone, his conviction was affirmed.

The principal government witness was one Kennington who bought non-taxpaid liquor for resale in Phenix City, Alabama. His principal supplier was the acquitted defendant Dryden, whose "front man" at the beginning of the conspiracy was the defendant Hutcheson.[1] Before Hutcheson pleaded guilty, Kennington testified to a number of transactions involving purchases from Dryden and Hutcheson, with deliveries made by defendant Godwin (R. 64–66). Late in 1961, Hutcheson "went off" as Kennington's supplier and was replaced by petitioner whose first delivery was of 250 to 300 gallons. Shortly thereafter, when Kennington approached Dryden directly

[1] Dryden told an undercover A.T.U. agent that he did not have to get out in front in the liquor business because he had other businesses (R. 566).

about buying some whiskey, Dryden asked, "What, ain't Ralph [petitioner] taking care of you?" (R. 74–76, 78). Petitioner and defendant Rogers, another driver, delivered 738 gallons of whiskey to Kennington's place of business in Phenix City in March 1962 (R. 80, 84–85). Kennington was arrested and thereafter worked with undercover agents assigned to this case. A few days after Kennington's arrest, a delivery of 744 gallons of whiskey was made to him by Rogers, followed by petitioner in a passenger car (R. 80–85, 210–212). Petitioner and Rogers were arrested on March 25, 1962, when State officers came upon their stalled car loaded in back with 254 gallons. The men admitted that the liquor was theirs and asked the officers to give them a "break" (R. 241–247).

In August 1962, Kennington, accompanied by an undercover agent, talked with Dryden in Tallapoosa, Georgia. Kennington said that he was going to start back in the liquor business and needed some whiskey. Dryden told him to go back to Phenix City and that petitioner would communicate with him in a day or two. Kennington objected to this arrangement, and Dryden told him to go back and Godwin would get in touch with him. On September 5, 1962, Godwin reported to Kennington that the car delivering the whiskey was stuck in the mud. Later they unloaded 150 gallons in the woods and Kennington paid Godwin $562.50 (R. 343–348).

Numerous telephone calls were made during the period from August 1961 to May 1962 between numbers listed in the names of Kennington, Dryden, Hutcheson

and petitioner's wife (R. 251–264, 308–312, 320–332, 341–342).

Dryden testified in his own behalf, admitting communications with Hutcheson and Kennington, but denying that he participated in any liquor transactions (R. 446–488).

ARGUMENT

Petitioner argues that the acquittal of Dryden removed the "connecting link" in the conspiracy charged by the government and that therefore petitioner could not properly have been convicted of the conspiracy charged in the indictment. The court of appeals, assuming *arguendo* that the proof did show a variance, found that the alleged variance did not affect petitioner's substantial rights, and that the case was therefore more like *Berger* v. *United States*, 295 U.S. 78, than *Kotteakos* v. *United States*, 328 U.S. 750. This ruling was amply justified on the facts of this case.

Petitioner was shown to have entered into a conspiracy with Kennington to supply illegal liquor to him with the assistance of Rogers. Thus there was ample proof, as pointed out in Judge Magruder's opinion, of petitioner's participation in a conspiracy with others to violate the liquor laws. We may assume that on the facts, as reflected in the jury's verdict, (*i.e.* with Dryden out of the case) the earlier conspiracy among Kennington, Hutcheson, and Godwin was a separate conspiracy to supply Kennington. The *Kotteakos* decision, however, made it clear that the mere fact of variance does not *ipso facto* require a reversal. In this case the evidence of petitioner's

direct participation in the conspiracy charged to him was so clear and the evidence as to his participation so separate and distinct from that as to Hutcheson, that there is no reason to reverse petitioner's conviction. Moreover, at least some of the evidence relating to Hutcheson would properly have come into the case if the conspiracy involving petitioner had been tried alone since Kennington's dealings with Hutcheson would be background evidence to explain how and why petitioner came to deal with Kennington. There is thus no occasion for this Court to review the conclusion of the court of appeals, based on an evaluation of the particular facts of this case, that the variance suggested by the jury's verdict did not affect petitioner's substantial rights.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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